UT 07-2
Tax Type: Use Tax
Issue: Use Tax on Aircraft Purchase

STATE OF ILLINOIS
ILLINOIS DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	**No. 05-ST-0000** **IBT# 0000-0000** **NTL# 00 0000000000000**
v.	
***ABC* AIR LLC ,** **Taxpayer**	**Ted Sherrod** **Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General John Alshuler on behalf of the Illinois Department of Revenue; Paul A. Gilman and Eric M. Brown of Aronberg Goldgehn Davis & Garmisa on behalf of ***ABC*** Air LLC.

Synopsis:

The Illinois Department of Revenue ("Department") conducted an examination of ***ABC*** Air LLC ("taxpayer") with respect to a single transaction: namely, the relocation of an aircraft purchased outside of the state of Illinois on or about April 4, 2000 and stored and used in Wisconsin until April 2001. At the conclusion of this examination, the Department determined that the taxpayer owed additional use tax on this aircraft as a consequence of its relocation to Illinois in April 2001. On September 27, 2005, the Department issued a Notice of Tax Liability to the taxpayer for additional tax, plus interest and penalty. The taxpayer timely protested this notice. A hearing in this matter was held on October 5, 2006 at which the parties submitted a stipulation regarding the

facts presented in this case. Subsequent to this hearing, the taxpayer presented a brief in which it contended that the Illinois use tax does not apply to the taxpayer's purchase and use of the aircraft at issue because it falls under the exemption from the Use Tax Act for "[P]roperty acquired by a nonresident" prescribed by section 3-70 of the Use Tax Act, 35 **ILCS** 105/3-70. The Department has submitted a reply to the taxpayer's brief. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. Taxpayer is a Delaware limited liability company in good standing in the state of Delaware. Stipulation of Uncontested Facts (hereinafter "Stip.") number ("No.") 1.
2. Taxpayer has at no time filed an Application to Transact Business with the Secretary of State of Illinois. Stip. No. 2.
3. ***John Doe*** ("***Doe***"), a resident of the state of Illinois, is and at all times has been the sole owner of the membership interests in the Taxpayer. Stip. No. 3.
4. Taxpayer acquired a 1980 Cessna 340A, Serial #0000-0000, 0#00000, 00#000000000 (the "Aircraft") from ***XYZ*** Aviation, Inc., on or about April 4, 2000, for a purchase price of $350,000. Stip. No. 4.
5. On April 4, 2000, ***Doe*** was a resident of Anywhere, Wisconsin. Stip. No. 5.
6. The Aircraft was delivered to the Taxpayer in Paducah, Kentucky. Stip. No. 6.
7. Prior to purchase a maintenance inspection was performed in Aurora, Illinois, and ***Doe*** flew the aircraft from Paducah, Kentucky to Aurora, Illinois for that purpose. Stip. No. 7.

8. Following the inspection, ***Doe*** flew the aircraft to Lawrence J. Timmerman Airport, in Milwaukee, Wisconsin ("Timmerman Airport") where the purchase transaction was completed on or about May 6, 2000. Stip. No. 8.

9. From May 2000 through April 2001, the Aircraft was kept in an aircraft hanger at Timmerman Airport, and the Aircraft was regularly flown in and out of Timmerman Airport. Stip. No. 9.

10. In April 2001, ***Doe*** established his primary residence in the state of Illinois, and the Aircraft was relocated to ***Anywhere*** Airport, in Illinois. Stip. No. 10.

11. Since April 2001, the Aircraft has been kept in a hanger at ***Anywhere*** Airport and has been regularly flown in and out of ***Anywhere*** Airport. Stip. No. 11.

12. The value of the Aircraft as of April 2001 for purposes of the Motor Vehicle Use Tax was $290,000 (the original purchase price less $59,500 allowable depreciation for the period from May 2000 to April 2001). Stip. No. 12.[1]

13. At all times from and after the purchase of the Aircraft by the taxpayer, the Aircraft has been used solely by ***Doe*** for his personal use and enjoyment. Stip. No. 13.

14. At no time since its organization has the taxpayer engaged in business as a commercial carrier for hire, other commercial air service activities or any other trade or business. Stip. No. 14.

Conclusions of Law:

At issue in this case is whether the taxpayer's storage and other use of a Cessna 340A aircraft, Serial #0000-0000, 0#00000, 00#000000000 in Illinois subsequent to its

[1] The Notice of Tax Liability at issue is based upon the original purchase price of the aircraft less an allowance for depreciation for the period of time between the purchase of the aircraft and its relocation to the State of Illinois. See Department's Brief p. 2.

storage and use outside of this state for almost a year is exempt from Illinois use tax pursuant to section 3-70 of the Illinois Use Tax Act, which provides as follows:

> Property acquired by nonresident. The tax imposed by this Act does not apply to the use, in this State, of tangible personal property that is acquired outside this State by a nonresident individual who then brings the property to this State for use here and who has used the property outside this State for at least 3 months before bringing the property to this State.
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> Where a business that is not operated in Illinois, but is operated in another State, is moved to Illinois or opens an office, plant, or other business facility in Illinois, that business shall not be taxed on its use, in Illinois, of used tangible personal property, other than items of tangible personal property that must be titled or registered with the State of Illinois or whose registration with the United States Government must be filed with the State of Illinois, that the business bought outside Illinois and used outside Illinois in the operation of the business for at least 3 months before moving the used property to Illinois for use in this State.
>
> "Acquired outside this State", whenever used in this Act, in addition to its usual and popular meaning, also means the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to a point of delivery outside this State.
>
> 35 **ILCS** 105/3-70

Section 3 of the Illinois Use Tax Act, 35 **ILCS** 105/1 *et seq*. imposes a use tax upon the privilege of using tangible personal property such as an aircraft in Illinois that was acquired in a retail sale transaction from a retailer. 35 **ILCS** 105/3. The Use Tax Act ("UTA") compliments the Retailers' Occupation Tax Act ("ROTA"), which is a tax on persons engaged in the business of selling at retail tangible personal property (35 **ILCS** 120/2), and is imposed at the same rate as the ROTA. Compare 35 **ILCS** 105/3-10 and 35 **ILCS** 120/2-10. The function of the use tax is to prevent the avoidance of the Retailers' Occupation Tax by persons who make purchases in states that do not impose any similar tax on sales and thus protects Illinois merchants from the diversion of

business to retailers outside of Illinois. Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 418 (1996).

Because the use tax is designed to compliment rather than duplicate the Retailers' Occupation Tax, an Illinois retailer that collects the use tax as an agent of the State is correspondingly relieved of any ROTA liability on the transaction. Chicago Tribune Company v. Johnson, 119 Ill. App. 3d 270, 273 (1st Dist. 1983). Moreover, credit is given for taxes paid to another state. 35 **ILCS** 105/3-55(d); 86 Ill. Admin. Code, ch. I, section 150.310(a)(3). Conversely, if the person who uses the property does not pay the use tax to the retailer, it must be paid directly to the Department. 35 **ILCS** 105/3-45.

Section 12 of the Use Tax Act incorporates by reference section 4 of the Retailers' Occupation Tax Act ("ROTA") (35 **ILCS** 120/1 *et seq.*), which provides that a certified copy of the corrected return issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 **ILCS** 105/12; 35 **ILCS** 120/4. Once the Department has established its *prima facie* case by submitting the certified copy of the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987). To prove its case, a taxpayer must present more than testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support its claim. *Id.*

The taxpayer has stipulated that it purchased an aircraft outside of Illinois, which it subsequently moved to Illinois. The stipulation indicates that the taxpayer stored this

aircraft at ***Anywhere*** Airport in Illinois and that ***John Doe***, the sole owner of the taxpayer, regularly flew the aircraft in and out of ***Anywhere*** Airport. See Stip. No. 3, 11, 13. The term "use" as used in the UTA is broadly defined to include "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property", and clearly identifies as taxable uses the authorized use of the taxpayer's property engaged in by the taxpayer's owner in this state. See 35 **ILCS** 105/2. In spite of these facts, however, the taxpayer contends that it is not subject to Illinois use tax on its admitted use in Illinois of tangible personal property, the aircraft in controversy, by virtue of the exemption from tax set forth at section 3-70 of the UTA, 35 **ILCS** 105/3-70, the first paragraph of which exempts tangible personal property which: (1) is acquired outside of Illinois by a nonresident individual; (2) is brought into Illinois by said nonresident individual for use in Illinois; and (3) has been used outside of Illinois by said nonresident individual for at least three months before being brought into this state.[2]

Section 3-70 of the UTA, by its terms, provides a use tax exemption for "non-resident individuals" that acquire property outside of Illinois and subsequently bring it into this state for storage and use. The principal issue to be determined in this case is whether this exemption is applicable to the taxpayer, a single member limited liability company which, although not itself a private individual, is completely owned and controlled by ***John Doe***, and which holds property (the aircraft) which is used exclusively by ***John Doe*** for his personal benefit.

[2] The second paragraph of section 3-70 of the Use Tax Act applies to property used in a business that is moved to Illinois from outside of this state. See 35 **ILCS** 105/3-70. Since the taxpayer has stipulated that the aircraft at issue was never used for any business purpose, the applicability of the second paragraph of Section 3-70 of the UTA is not at issue in this case.

It is well settled that tax exemption provisions are strictly construed in favor of taxation. Heller v. Fergus Ford, Inc., 59 Ill. 2d 576, 579 (1975). The party claiming the exemption has the burden of clearly proving that it is entitled to the exemption, and all doubts are resolved in favor of taxation. *Id*. Every presumption is against the intention to exempt the property from taxation. Follett's Illinois Book & Supply Store, Inc. v. Isaacs, 27 Ill. 2d 600, 606 (1963).

The Department contends that, in order to qualify for exemption pursuant to the first paragraph of section 3-70 of the Use Tax Act, the taxpayer must show the following: (1) that tangible personal property was acquired outside of Illinois; (2) that this property was used outside of this state for a least 3 months prior to being brought into this state; and (3) that this property was acquired and used by an individual that brought this property into Illinois. Department's Brief p. 3. It contends that all of these prerequisites have not been satisfied since the taxpayer is not an "individual" but rather a limited liability company, albeit one owned and controlled by only one individual. *Id*. The taxpayer contests this claim, arguing that although the term "individual" is used in section 3-70 of the UTA, the obvious purpose of this provision is to encompass any property acquired for a personal and non-business use. Taxpayer's Brief pp. 5 – 8. It bases this contention on the language used in the second paragraph of section 3-70 of the UTA which provides an exemption for certain property used in a "business" outside of Illinois before being brought into this state. *Id*. It construes the law's reference to business property in its second paragraph as implicitly extending the scope of the first paragraph to property brought into this state that the taxpayer does not intend to use for any business purpose. *Id*. Its rationale for this conclusion is language from a statement in Philco

Corporation v. Department of Revenue, 40 Ill. 2d 312 (1968), in which the court asserts that "[T]here is no difference in the application of [section 3-70 of the UTA] to the property of an individual and that of a corporation, nor is there a difference in their application to property used for individual enjoyment and that for business purposes." Philco, *supra* at 326. See Taxpayer's Brief p. 6 ("[T]he term 'individual,' within the context of Section 3-70 of the Act as a whole, was used by the legislature to distinguish between personal use property and property utilized for a commercial purpose. [T]hat use of that term was not intended to draw a distinction between ownership by a natural person and an entity as the basis for taxation[.]").

In analyzing the issue of statutory construction presented in this case, we must keep in mind that the primary objective is to give effect to the intention of the legislature. Kraft v. Edgar, 138 Ill. 2d 178, 189 (1990). Furthermore, the plain and ordinary meaning of statutory language is presumed to be intended. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 270 (1998) ("Each undefined word in the statute must be ascribed its ordinary and popularly understood meaning.").

Applying the aforementioned tenets of statutory construction, the legislature's choice in providing a tax exemption to "individuals" in section 3-70 of the UTA affords little leeway for resort to textual analysis or legislative history to determine the legislature's intent. The term "individual" has a well-understood and common meaning. The Illinois courts have instructed that words in a statute without definition are to be given their plain and commonly accepted meaning where the plain and commonly accepted meaning of the term is clear. *Id.* While the term "individual" is not defined in

the UTA, Black's Law Dictionary provides this forum with just such a common definition.

> As a noun, the term denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association; but it is said that this restrictive signification is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons.
> Black's Law Dictionary (5th ed. 1979)

The taxpayer contends that the legislature intended an unusual definition of the term "individual" that is broad enough to encompass limited liability companies and other entities that are ordinarily understood to exceed the breadth of this term. In support of this claim, the taxpayer states as follows.

> In interpreting the statute, it is instructive that the legislature used the term "individual" in the first paragraph rather than "natural individual" and the term "business" in second paragraph instead of the word "entity" or the phrase "any Person other than a natural individual." *Id.* Section 2 of the Act specifically defines the word "Person" to include "natural individuals," various business entities and individuals acting in a representative capacity. If the legislature had intended to distinguish between natural individuals and any other entity or individuals acting in a representative capacity as the basis for exemption under Section 3-70, it would have used the terms defined within the statute to more clearly do so.
> Taxpayer's Brief pp. 6, 7.

The premise of the taxpayer's contention is that the term "individual" and the term "natural individual" identify separate and distinct concepts and are not the same. However, the taxpayer has cited no authority whatsoever to support this novel concept. Moreover, the taxpayer's interpretation of the term "individual" as something distinct from a "natural individual" is not supported by Illinois case law which has, in usage, ascribed the same meaning to both terms. See People v. Bohne, 312 Ill. App. 3d 705, 707 (4th Dist. 2000) ("The statute goes on to provide that any individual or corporation

(see 35 **ILCS** 105/2 (West 1994) (definition of person)) subject to its provisions that fails to file a use tax return is guilty of a Class 3 felony if the amount of tax due is $300 or more."). Moreover, in Philco, *supra*, the court states as follows:

> There is no difference in the application of [section 3-70 of the UTA] to property of an individual and that of a corporation … [.] The statutory emphasis is upon the fact that the property accompanies its owner and is brought to Illinois by its owner for his use here. Where the owner, whether a business or a private individual, remains out of the State, the exemption does not apply." Philco, *supra* at 326. (emphasis added)

Implicitly, by its choice of words, the court in the above quoted language equates the term "individual" with the term "private individual" which, as the dictionary definition of the term "individual" noted above indicates, is analogous to a "natural person."

Furthermore, the taxpayer's contentions cannot be reconciled with the definitional provisions of the UTA contained in section 2 of this Act at 35 **ILCS** 105/2. Prior to January 1994, section 2 of the UTA defined the term "person" as follows:

> "Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or receiver, executor, trustee, guardian or other representative appointed by order of any court.
> 35 **ILCS** 105/2 as in effect prior to January 1, 1994; see 35 **ILCS** 105/2 (Smith-Hurd) (Historical and Statutory Notes).

This statutory provision was amended by P.A. 88-480 effective January 1, 1994 to provide as follows:

> " Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, limited liability company, or receiver, executor, trustee, guardian or other representative appointed by order of any court.
> 35 **ILCS** 105/2 as in effect on and after January 1, 1994; see 35 **ILCS** 105/2 (Smith-Hurd) (Historical and Statutory Notes) (emphasis added)

The effect of this amendment is to clearly distinguish the term "limited liability company" from the term "individual."

The first paragraph of section 3-70 of the UTA predates this change, the current version of this statutory provision having been enacted by the legislature in 1972. See Ill. Rev. Stat. 1991, ch. 120, para. 439.3 (Smith-Hurd) (Historical and Statutory Notes); P.A. 77-2829, eff. December 22, 1972. Accordingly, it must be presumed that when the legislature passed P.A. 88-480 to add "limited liability company" to the definition of the term "person" contained in section 2 of the UTA and applicable to all other provisions of this Act, it knew of its longstanding limitation on the exemption to "individuals" contained in the first paragraph of 3-70. Christ Hospital and Medical Center v. Illinois Comprehensive Health Insurance Plan, 295 Ill. App. 3d 950, 961 (1st Dist. 1998). Thus, when the General Assembly distinguished between an "individual" and a "limited liability company" in section 2 of the UTA in the definition of the term "person" under the UTA upon enactment of P.A. 88-480, it knew that it had previously confined the exemption contained in the first paragraph of section 3-70 to "individuals."

It is a settled principle of statutory construction in Illinois that "[I]f it can be gathered from a subsequent statute what meaning the General Assembly attached to words of a prior statute, it will be treated as a legislative declaration of its meaning, and will govern its construction." IL-LP STATUTES § 70, citing People v. Shepard, 152 Ill. 2d 489 (1992); Herrarra v. Lester Engineering Co., 116 Ill. App. 3d 228 (1st Dist. 1983); Bruni v. Department of Registration and Education, 8 Ill. App. 3d 321 (1st Dist. 1972), affirmed, 59 Ill. 2d 6 (1974). The clear import of the change made by the General Assembly by P.A. 88-480 is to remove any doubt that the term "individual" and the term

"limited liability company" are distinct and separate types of persons and are not synonymous terms. Applying the settled principles of statutory construction noted above, it is crystal clear from P.A.88-480 that the legislature never intended to construe individuals and limited liability companies to be the same type of "person" under the UTA. Given this fact, and the obvious application of the definitions contained in section 2 of the UTA in determining the meaning of terms used in section 3-70 of the UTA, the legislature could not possibly have intended the term "individual" when used in section 3-70 to have the broad meaning the taxpayer seeks to ascribe to it.

The foregoing considerations compel the conclusion that the legislature did not intend for the term "individual" to encompass any type of limited liability company. Since an "individual" and a "limited liability company" are entirely different types of "persons" for purposes of applying the UTA pursuant to section 2 of that Act, it would have been necessary for the legislature to expressly amend the term "individual" as used in section 3-70 of the UTA to include a limited liability company within this term to reach the conclusion the taxpayer advocates. Had it done so, the legislature would have differentiated the meaning to be ascribed to this term when used in section 3-70 of the UTA from the general definition of this term set forth in section 2 of this Act. However to date, the legislature has failed to modify section 3-70 of the UTA in this manner.

The taxpayer also cites various Illinois income tax authorities holding that limited liability companies must be treated as the alter ego of individuals for Illinois income tax purposes in some circumstances. Taxpayer's Brief p. 5. However, these authorities pertain to the status of single member limited liability companies electing to have their

entity status disregarded for federal income tax purposes pursuant to Treas. Reg. Section 301-7701-3 under the Internal Revenue Code. See 86 Ill. Admin. Code, ch. I, section 100.9750(b), and GIL 98-0038, which are cited as authority by the taxpayer. Moreover, the income tax regulation and ruling the taxpayer has cited have nothing to do with the Use Tax Act at issue in this case.

The taxpayer further contends that the record supports a determination that ***John Doe***, who is the sole owner of the taxpayer and who uses the aircraft it owns solely for his personal benefit, is the person to whom the criteria for the application of the exemption provided for by section 3-70 of the UTA should be applied. Taxpayer's Brief pp. 8 – 10. The legal premise of the taxpayer's contention is that the substance of transactions rather than their form should govern the application of section 3-70.

However, the Illinois sales and use tax statutes, as construed by the courts, clearly look to title transfer and thus negate the application of the "substance over form" doctrine to transactions involving the Retailers' Occupation Tax Act and the related Use Tax Act, which incorporates by reference the fundamental terminology and concepts underlying the ROTA (see 35 **ILCS** 105/12). Weber-Stephen Products, Inc. v. Department of Revenue, 324 Ill. App. 3d 893 (1st Dist. 2001); In re Stoecker, 179 F. 3d 546, 550 (7th Cir. 1999); O'Brien v. Isaacs, 32 Ill. 2d 105, 107 (1965). The case of Weber-Stephen Products, Inc., *supra*, is particularly instructive. At issue in this case was a use tax assessment on an aircraft acquired in a series of transactions designed to qualify for deferral of gain under section 1031 of the Internal Revenue Code, 26 **U.S.C.A.** section 1031. In its decision, the court relied on the transfer of title reflected in a bill of sale for an aircraft as being evidence of a taxable sale. Citing several earlier ROTA and

use tax cases, the court noted that the Illinois courts have historically looked to the transfer of title as proof of the taxable character of a sale or use. See Weber-Stephen, *supra* at 898-900.

The taxpayer cites J.I. Aviation v. Department of Revenue, 335 Ill. App. 3d 905 (1st Dist. 2002) as support for its claim that the substance over form doctrine should be applied in this case. However, the substance over form doctrine was applied in J.I. Aviation only "to determine how to treat differently situated third-party intermediaries in a Code section 1031 like-kind exchange." *Id*. at 920. The court in that case outlined various criteria under which the intermediary may be considered either a substantive seller or merely an agent facilitating an isolated or occasional sale. In the instant case, the role of intermediaries is not at issue. The record indicates that ***ABC*** Air was not acting in the role of an intermediary when it purchased the aircraft upon which use tax has been assessed, since it never intended to transfer title to this aircraft to ***John Doe*** or anyone else. The only issue presented in this case is whether ***John Doe*** may be treated as the purchaser and owner of the aircraft in controversy for purposes of applying section 3-70 of the Use Tax Act. Therefore, the propriety of applying the substance over form doctrine to determine the status of an intermediary giving rise to the decision reached in J.I. Aviation, is not at issue in this case.[3]

The parties have stipulated that ***ABC*** Air LLC "acquired a 1980 Cessna 340A, Serial number 0000-000, 0#00000, 00#000000000 … from ***XYZ*** Aviation, Inc., on or

[3] Although Weber-Stephen Products, Inc., *supra* and J.I. Aviation, *supra* cited above both address the use tax consequences of a like-kind exchange qualifying for exemption pursuant to section 1031 of the Internal Revenue Code, J.I. Aviation was decided on a narrower issue than that addressed in Weber-Stephens. For this reason, I find the analysis in Weber-Stephen Products, Inc., *supra* , because it addresses the significance of title transfers in analyzing the tax consequences of transactions under the ROTA and the UTA, pertinent to the resolution of the issue presented in this case.

about April 4, 2000, for a purchase price of $350,000." See Stip. No. 4. This stipulation negates any inference that ***John Doe*** ever acquired title to the property giving rise to the Department's assessment determination. Since the courts ordinarily look to form, and specifically to the actual title transfers that took place, rather than substance, in construing the tax consequences of retail purchase transactions and subsequent activities under the Use Tax Act, precedent cited above dictates that the taxability of the taxpayer's aircraft use be governed by the title transfer to the taxpayer, a limited liability company, shown in the record. Such an analysis precludes the treatment of ***John Doe*** as the *de facto* purchaser and user of the aircraft at issue in this case. Consequently, the taxpayer's "substance over form" analysis is insufficient to establish the legal legitimacy of the taxpayer's claim.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's Notice of Tax Liability number 00 0000000000000 be affirmed in its entirety.

Ted Sherrod
Administrative Law Judge

Date: December 18, 2006